IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.650 OF 1988

Girjabai Tukaram Nimbalkar
(since deceased through L.Rs.)
Shardabai Ramrao Bhoite ...Appellant

Vs.

Vishnu Bala Nimbalkar
(since deceased by Legal Heirs)
1. Mahadeo Vishnu Nimbalkar
2. Bapurao Vishnu Nimbalkar
3. Haribhau Vishnu Nimbalkar
4. Prabhakar Vishnu Nimbalkar
5. Shrimant Vishnu Nimbalkar
6. Subhadra Krishna Pisal
7. Shakuntala Dattatraya Yadao ...Respondents

Mr.R.A.Thorat for the Appellant
Mr.K.B.Sonwalkarfor the Respondents No.1 to 7.

CORAM: A.S.OKA, J.
DATED: FEBRUARY 2,2005.

ORAL JUDGMENT:

1. On 3rd February 1989 this Court admitted the Second

Appeal by passing the following order :

. "Counsel for the parties are heard.

. Admitted - the substantial question of law being whether the suit agreement cloaked a money lending transaction and whether in equity the Plaintiffs were entitled to specific performance ?

. Appeal notice to be waived."

2. I have heard the Counsel appearing for the parties on the said substantial question of law framed by this Court. At the outset, the learned Counsel appearing for the Appellant stated that though one more important question was not raised in the Courts below, he wants to raise the said question.

The said question is "what is the effect of original Plaintiff not signing the suit agreement ?" In view of proviso to Sub Section 5 of Section 100 of Code of Civil Procedure, 1908, I have permitted the learned Counsel for the Appellant to argue the said question.

3. Before considering the submissions made by the Counsel appearing for the parties, it will be necessary to refer the facts of the case in brief. The Second Appeal is preferred by the original Defendant. The Respondents are the legal representatives of the original Plaintiff. For sake of convenience, reference is made to the parties with reference to their original status in the Trial Court. The case of the Plaintiff is that the Defendants agreed to sell the suit land by agreement dated 5th April 1976. The total consideration was fixed at Rs.3300/- and a sum of Rs.3000/- was paid as an earnest money and the balance amount was to be paid at the time of execution of the sale deed. The suit land was put in possession of the Plaintiff. After issuing two legal notices, the Plaintiff filed a suit for specific performance.

4. The Defendants resisted the suit by filing a written statement. Though the execution of the agreement was admitted by the Defendants, a contention was raised by them that the same was not to be acted upon as it was executed as a security for repayment of loan. The Defendants also disputed the case of the Plaintiff that he was put in

possession. The learned Trial Judge held that the Defendants have failed to prove that the agreement for sale was executed only by way of security and it was not to be acted upon. On all issues the learned Trial Judge held in favour of the Plaintiff and proceeded to pass a decree for specific performance. An Appeal preferred by the Defendants has been dismissed by the first Appellate Court.

5. The learned Counsel appearing for the Appellant submitted that the suit agreement was not signed by the Plaintiff. Relying upon the decision of Madras High Court reported in A.I.R. 1998 Madras page No.169 (S.M.Gopal Chetty Vs. Raman @ Natesan and 7 others), he submitted that as the agreement was not signed by the Plaintiff it cannot be termed as a binding contract. The learned Counsel further submitted that no issue was framed by the trial Court on readiness and willingness of the Plaintiff to perform his part of the contract. He submitted that as the original Plaintiff has failed to establish his case of payment of Rs.200/- to the Defendant after the execution of the agreement, the Plaintiff was not ready and willing to perform his part of the agreement. He submitted that the suit transaction was a money lending transaction. Considering the inadequacy of the consideration, relief of specific performance ought not to have been granted. Relying upon Section 528 of Bombay Stamp Act, 1958, the learned Counsel further submitted that the agreement was not admissible in evidence as it has been

executed on stamp paper purchased in the name of one Yeshwant.

6. The learned Counsel for the Respondents-Plaintiffs supported the impugned Judgment and Decree by pointing out the averments as regards readiness and willingness made in the plaint and the findings recorded by the Courts below on this aspect.

7. I have considered the rival submissions. In so far as the first submission made by the learned Counsel for Appellant is concerned, a reference will have to be made to the relevant provision of Indian Contract Act, 1872. Section 10 of the said Act of 1872 read thus :

> "10. What agreements are contracts - All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> . Nothing herein contained shall affect any law in force in [India] and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents. "

There is no provision in the law which requires that every contract between the parties is required to be reduced into writing and is required to be signed and executed by both the parties. The exception is where particular provision of the statute requires a contract to be executed in writing or the contract to be registered under the provisions of Indian

Registration Act,1908. The only question to be considered is whether there was a proposal which was accepted. It was not the case of the Defendants either in the written statement or at the time of recording of evidence there was no agreement between the parties. In fact the case made out is that there was an agreement between the parties and it was not to be acted upon as the agreement was executed as a security for repayment of loan. I have perused the decision of the Madras High Court relied upon by the learned Counsel. In the facts of the said case there was no agreement at all between the parties. Therefore, as there is no dispute about the execution of the suit agreement, there is no merit in the first submission of the learned Counsel appearing for the Appellant.

8. In so far as the nature of the agreement is concerned, there are concurrent findings of fact recorded by both the Courts below that the Defendants have failed to prove that the agreement was executed as a security for repayment of loan. After considering the oral evidence on record, the courts below have held that the circumstances clearly indicate that the parties contemplated execution of agreement for sale. It is pertinent to note that the first notice was issued by the Plaintiffs-Defendants on 22nd January 1980 and though the same was received by the defendants, no reply was sent by the Defendants raising the said contention. There is no reason to disturb the concurrent findings of fact recorded

by the Courts below on this aspect.

9. In so far as readiness and willingness is concerned, it is to be seen here that in the plaint clear averment has been made by the original Plaintiff that he is ready and willing to pay the balance consideration. The substantial part of the agreed consideration was paid by way of earnest money and even according to the Defendants a only sum of Rs.300/- remained to be paid. On the basis of pleadings of readiness and willingness, evidence has been led to show that the Plaintiff was ready and willing to perform his part of the agreement. The parties to the suit were aware that the issue of readiness and willingness was involved and therefore though a specific issue was not framed evidence was led on the said aspect. The Appellate Court has recorded a clear finding of readiness and willingness in favour of the Plaintiff. Therefore, non framing of issue of readiness and willingness by the trial Court has not resulted in prejudice to the Defendants. When substantial amount of Rs.3000/- out of consideration of Rs.3300/- was paid by the Plaintiff, it is difficult to come to the conclusion that the Plaintiff was not ready and willing to perform his part of the agreement.

9. In so far as the submission on provision of Section 528 is concerned, it must be noted that the said section was brought on the statute book with effect from 1st December 1989. There is nothing in the statute which shows that the

said provision has a retrospective operation.

10. In my view there is no merit in the Appeal and the same is dismissed with no order as to costs.

Judge.